



RECEIVED
Copyright Royalty Board

JUL 18 2017

Sirius XM Radio Inc. Closing Statement

July 18, 2017

Interactive Service Market Remains a Complementary Oligopoly



	Revenue Per Subscriber	Royalty Per Subscriber	Percent of Revenue Royalty
2014	\$9.81	\$5.64	57.5%
2015	\$9.75	\$5.58	57.3%
2016	\$9.70	\$5.62	58.0%
2014-2016	\$9.74	\$5.61	57.6%

Source: Shapiro CWRT, Table 1.

Conceded Lack of Price Competition in the Interactive Service Market



"Q. And Sony has not lowered its rates in an effort to get more plays on an interactive service, correct?

A. No."

5/15/17 Tr. 3836:25-3837:3 (Walker).

"Q. You don't recall ever lowering any of the rates you charge a subscription streaming service to secure additional plays of Universal content on the streaming service, correct?

A. That's correct."

5/16/17 Tr. 4030:8-12 (Harrison).

"Q. . . . Now let's come back to where we were a few minutes ago, which is whether you've observed any – any price competition, any instance in which a record label offered to lower its price to an interactive service to secure more plays on that interactive service. The answer is you've not observed that at all, have you?

A. I have not seen the evidence as you've described it there."

4/26/17 Tr. 1115:11-19 (Orszag).

SoundExchange Contradicts Itself in Claiming that Effective Rates Were Used in *Web IV*



“Sirius XM criticizes Mr. Orszag’s use of effective rates on the basis that the *Web IV* Judges used headline rates, not effective rates. As we have said many times, and will repeat once more, the *Web IV* decision itself says otherwise — **the per-play rates used for the interactive services benchmark were the effective rates in that case.**”

SoundExchange *SDARS III* Reply Findings, Response to ¶ 321

“For purposes of deriving a benchmark calculation for his per-play rate proposal ... **Prof. Rubinfeld relied only on the agreements’ stated minimum per play rates**, even if the record companies were actually paid under other payment branches that conveyed substantially more compensation per-play. **Had Prof. Rubinfeld instead relied on the average effective per play rates in the interactive service agreements, his proposed rate would have been nearly twice as high.**”

SoundExchange *Web IV* Findings ¶ 377

Professor Willig's Monopoly-Seller Opportunity Cost Measure



“Q. . . . You also agree that if there were a single monopoly seller of sound recordings, rather than individual labels, the opportunity cost of that seller licensing Sirius XM would be the same \$2.55 that you have computed, correct?”

A. Yes.”

5/2/17 Tr. 2139:23–2140:3 (Willig).

Professor Willig's Inconsistent Views of Competition



“[I]f we’re using a benchmark approach and using, say, the interactive markets, the subscription interactive markets as a benchmark . . . we ought to make sure that we think that the current royalty rates in the subscription interactive market reflect effective competition.” 5/2/17 Tr. 2042:22–2043:11 (Willig).

“Q. . . . And as you just said, I believe, you agree that if one is considering benchmarks for use here, then one needs to make sure that those benchmarks reflect effective competition, correct?”

A. Yes, I think that’s fair.” 5/2/17 Tr. 2132:8-12 (Willig).

“Q. . . . And your view is that when you use that same [interactive royalty rate] to calculate opportunity cost, that [the Judges] should take that market as it is rather than making an adjustment, correct?”

A. That would be my advice” 5/2/17 Tr. 2155:16-21 (Willig).

SoundExchange Witnesses Recognize Sirius XM's Promotional Value



Barros: “I agree” that “Sirius XM provides promotional value to record labels and artists.”

Barros WRT ¶ 23.

Kushner: Sirius XM is “the new radio” and a place “where our music that isn’t otherwise heard gets played”

5/11/17 Tr. 3569:21-3571:16 (Kushner).

Kushner: Sirius XM helps Atlantic “reach a broad audience” for “genres that are not well-served by terrestrial radio and tend to have lower usage on on-demand streaming services.”

Kushner WDT ¶ 66; 5/11/17 Tr. 3571:13-16 (Kushner).

Ford: Sirius XM has a “unique place in music” and “can play songs that wouldn’t get played, say, on terrestrial radio.”

5/1/17 Tr. 1845:9-13 (Ford).

Professor Lys's Reversal on the Relevance of Ability to Pay



Web IV:

"[A] company's ability to pay royalties, while still remaining profitable, and the 'willing buyer/willing seller' standard are two very distinct concepts."

4/27/17 Tr. 1592:22-1593:1 (Lys).

"[U]nder the willing buyer/willing seller standard . . . current profitability is not the criterion for deciding the statutory royalties."

4/27/17 1594:23-1595:1 (Lys).

SDARS III:

"It is my opinion that the profitability will affect the rate of which a willing buyer/willing seller will settle."

4/27/17 Tr. 1597:13-15 (Lys).

Evolution of Sirius XM Direct Licenses



	SDARS II	SDARS III
# Direct Licenses	95	558
% Plays	2-4%	6.2-7.2%
Quarterly royalties paid	~\$1.5 million (Q1 2013)	>\$4 million (Q1 2016)

Sources: White WDT ¶ 5; 5/17/17 Tr. 4221:6-14 (White); Determination of Rate and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services ("SDARS II"), 78 Fed. Reg. 23054, 23063 n.28 (Apr. 17, 2013); Trial Ex. 306, Response to Interrogatory 13; Shapiro CWRT at 40-42.

RESTRICTED – Subject to Protective Order in Docket No. 16-CRB-0001 SR/PSSR (2018-2022)

Direct Licensors Were Motivated by the Prospect of Enhanced Plays and Revenue



"Of course, the hope . . . was that we would strengthen our relationship and there would be more plays and there would be a greater relationship and we would do more together as business partners."

5/16/17 Tr. 4154:8-12 (Barros).

"More plays for us would be a good thing, yes."

5/16/17 Tr. 4154:18-19 (Barros).

"Q. . . . Overall, the more plays of Concord Music on Sirius XM, the more money Concord and its artists earn, isn't that true?"

A. True."

5/16/17 Tr. 4132:3-6 (Barros).

Mr. Orszag's Admissions Regarding Mid-Tier Service Agreements



UNITED STATES COPYRIGHT ROYALTY JUDGES

The Library of Congress

-----X
IN THE MATTER OF:)
)

DETERMINATION OF ROYALTY) Docket No.
RATES AND TERMS FOR) 16-CRB-0001-SR/PSSR
TRANSMISSION OF SOUND) (2018-2022)
RECORDINGS BY SATELLITE)
RADIO AND "PREEXISTING")
SUBSCRIPTION SERVICES)
(SDARS III))
-----X

BEFORE: THE HONORABLE SUZANNE BARNETT
THE HONORABLE JESSE M. FEDER
THE HONORABLE DAVID R. STRICKLER

Library of Congress
Madison Building
101 Independence Avenue, S.E.
Washington, D.C.

April 26, 2017
9:07 a.m.

VOLUME V

Reported by: Karen Brynteson, RMR, CRR, FAPR

1. prices or --
2. Q. So -- thank you. So, as
3. is a -- there was the Pandora Mer
4. was entered into and became the
5. evidentiary proffers and consider
6. proceeding, right?
7. A. Oh, in the Web IV proce
8. those details I don't know. It wa
9. Court.
10. Q. Let's call it the 2014 Pan
11. agreement. You're familiar with
12. A. Yes.
13. Q. And -- and I believe you
14. me that that prescribed rights are
15. consistent with the scope of the s
16. we're involved in -- there is that
17. here in this proceeding, correct?
18. A. That is correct.
19. Q. Take it you're not aware
20. superseding Pandora/Merlin or a
21. claiming to confer the same scop
22. rights for non-interactive subscrip
23. correct?
24. A. I believe that to be the case, bu
25. sitting here today --

19 Q. I take it you're not aware of any
20 superseding Pandora/Merlin or any other agreement
21 claiming to confer the same scope of statutory
22 rights for non-interactive subscription webcasters,
23 correct?

24 A. I believe that to be the case ...

4/26/17 Tr. 1145:19-24 (Orszag).

1. like -- again, the precise details a
2. agreement -- a caching of 100 so
3. to four specific channels in Pande
4. Q. And you recognize that th
5. typically would charge a premium
6. added functionality to a service li
7. what it otherwise would charge, a
8. A. I think that's a fair propos
9. source in the negotiation, if you're
10. again, you're not suggesting
11. Q. And I think -- would you
12. it would be a matter of common s
13. Pandora, on its part, didn't percei
14. added value to this functionality,
15. fall back on the statutory fee it is
16. paying, correct?
17. A. That is correct.
18. Q. Okay. Now, assuming
19. you have not proposed any adjus
20. to consider as it considers what y
21. superseding agreement from the
22. notwithstanding this added value
23. this added functionality? Is that correct?
24. A. That is correct. And if I may explain,
25. I'm more than happy to

11 Q. And I think -- would you also agree that
12 it would be a matter of common sense that if
13 Pandora, on its part, didn't perceive sufficiently
14 added value to this functionality, it would instead
15 fall back on the statutory fee it could otherwise be
16 paying, correct?

17 A. That is correct.

4/26/17 Tr. 1165: 11-17 (Orszag).

RESTRICTED – Subject to Protective Order in Docket No. 16-CRB-0001 SR/PSSR (2018-2022)